

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Chicago
Avenue Food & Deli
WIC Vendor No. W7220

FINDINGS OF FACT, CONCLUSIONS,
RECOMMENDATION
AND MEMORANDUM

The above-entitled matter came on for hearing before Allan W. Klein, Administrative Law Judge, on Tuesday, May 26, 1998, in St. Paul.

Appearing on behalf of the Department of Health was Wendy Willson Legge, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103.

Appearing on behalf of Chicago Avenue Food & Deli was Yahya Abukhdair, Chicago Avenue Food & Deli, 2500 Chicago Avenue South, Minneapolis, Minnesota 55404, without benefit of counsel.

Ibrahim Rddad served as the interpreter for the proceeding.

The record closed on June 10, 1998, upon receipt of a letter from Respondents, forwarded by Ms. Legge at their request.

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 14.61 the final decision of the Commissioner of the Department of Health shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with the Commissioner of Health, 717 Delaware Street Southeast, Minneapolis, Minnesota 55440.

STATEMENT OF ISSUE

Whether the Department should have disqualified Chicago Avenue Food & Deli from participation in the WIC program as a vendor, for a period of one year, based upon a first offense of permitting use of a vendor's stamp on a voucher accepted at a store which was not at the time authorized to accept WIC vouchers.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Chicago Avenue Food & Deli is located at 2500 Chicago Avenue South in Minneapolis, Minnesota. It is owned, in part, by Loay Abu-Khdair.

2. Brothers Food & Deli is located at 3501 Fourth Avenue South, in Minneapolis. It is owned by Loay Abu-Khdair.

3. The Abu-Khdair family consists of at least the father, plus three sons. All of them work, from time to time, at both the Chicago Avenue and Brothers operations. The Chicago Avenue operation is more profitable than the Brothers operation, and so approximately two years ago there was an attempt to sell or lease the Brothers operation to someone else. An agreement was reached with one Majdi Abusharar to become a partner and to assume day-to-day management responsibilities for the Brothers operation. However, at some point early in 1997, Majdi Abusharar decided that the Brothers was not generating enough money for him, and so he announced that he would be immediately abandoning the operation. This was a surprise to the Abu-Khdair family, who were forced to try to staff and manage both the Chicago and Brothers facilities. It proved difficult to staff both, and a number of friends and relatives were pressed into service at the Brothers facility, in order to keep it open.

4. During the winter and spring of 1998, the Department conducted an intensive investigation of the WIC program in Hennepin County. Every retail food store in the county was investigated. On March 3, 1998, an undercover investigator entered Brothers Food & Deli and purchased food using a WIC voucher. Brothers Food & Deli was not an authorized WIC vendor, and although it had applied for authorization on or about December 20, 1997, the application was still pending as of March 3, 1998. The Brothers' license was subsequently denied as a result of the incident described in Finding 5, below. Chicago Avenue Food & Deli, however, had been an authorized WIC vendor for some years and was an authorized vendor in March of 1998. It had been issued WIC Vendor No. 7220.

5. At the close of business on March 3, 1998, Eihab Abu-Khdair, one of the three brothers, gathered all of the receipts from the Brothers store and took them to the family residence, which was at the back of the Chicago Avenue store. He noted a WIC voucher among the receipts, and set it aside, knowing that Brothers was not authorized to accept WIC vouchers. He left it on top of a table or television set because he didn't know what to do with it. Bank deposits for both stores were usually handled by the Abu-Khdairs' father. The father was away on an overseas trip and did not return until a few days after March 3. When he returned, he saw the voucher in the home, and assumed that it had come from the Chicago Avenue facility. He stamped it with the Chicago Avenue WIC vendor's stamp and deposited it into the Chicago Avenue bank account. The voucher was presented to the WIC program's bank and was paid on March 10, 1998.

6. The same undercover investigator was again sent in to Brothers at some unspecified later date in order to determine whether or not she could again use a WIC voucher there. On the second visit, the cashier happened to be Eihab Abu-Khdair. He knew that Brothers was not allowed to accept WIC vouchers, and so he refused to take it, even though the investigator urged him to, claiming that she had been able to use

them there before. Eihab Abu-Khdair stated that Brothers was not yet authorized to participate in the WIC program and he could not take the voucher.

7. The Department staff determined that using the Chicago Avenue's vendor stamp to cash the voucher taken at the Brothers on March 3 was a direct violation of the Retail Food Vendor Guarantee Agreement which the Chicago Avenue store had executed. On April 15, 1998, the Department notified the Chicago Avenue store that it was disqualified as a WIC program vendor for a period of one year, effective April 30, 1998.

8. On April 20, 1998, Loay Abu-Khdair filed an appeal of that decision, and on May 7, 1998, a Notice of and Order for Hearing was issued setting the hearing for May 26.

9. Chicago Avenue Food & Deli filed the appeal because it averages between \$8,000-\$10,000 gross sales of WIC-paid supplies each month, and WIC is important to the store.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Health have jurisdiction in this matter pursuant to Minn. Stat. § 14.50, 7 C.F.R. § 246.18, and Minn. Rule pt. 4617.0100, subp. 1. The Notice of Hearing was proper in all respects and the Department has complied with all other substantive and procedural requirements of law or rule.

2. Minn. Rule pt. 4617.0120, subp. 6 (1997) provides that the Commissioner shall enforce the disqualification provisions in each fully executed vendor agreement or vendor guarantee.

3. The vendor guarantee with Chicago Avenue Food & Deli in force on March 3, 1998 requires that the vendor must maintain compliance with WIC vendor stamp requirements, including using the vendor stamp to validate only WIC vouchers accepted at the vendor's location (Ex. 1, p. 4, § VIIA).

4. The vendor guarantee provides that if a vendor permits the use of a vendor stamp in a way that is inconsistent with the vendor guarantee, then the vendor will be disqualified for 12 months for the first offense and 24 months for each subsequent offense.

5. The use of the Chicago Avenue vendor stamp to validate a WIC voucher accepted at the Brothers Food & Deli on March 3, 1998 did violate the vendor guarantee so as to allow the Department to disqualify Chicago Avenue Food & Deli for a period of 12 months.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED that the Commissioner of Health take disciplinary action against Chicago Avenue Food & Deli as an eligible vendor in the WIC program.

IT IS FURTHER RECOMMENDED that the Commissioner consider the Memorandum prior to making her decision in this matter.

Dated this 17th day of June 1998.

ALLAN W. KLEIN
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Department is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail.

Reported: Tape Recorded, No Transcript Prepared.

MEMORANDUM

I.

There is no dispute about the facts of the March 3 undercover "buy" and the use of the Chicago Avenue stamp. The Respondents agreed to a stipulation in order to expedite the appeal hearing. The only dispute is whether the use of the stamp was an intentional violation or not.

The Respondents argue that because of the unexpected pull-out by their partner and manager at the Brothers, staffing patterns there were chaotic. Friends and relatives were asked to help keep the store open until management could be stabilized. During this time, somebody (still unknown) accepted the WIC voucher at the unauthorized location. One brother recognized it was wrong, and set the voucher aside. His father returned from a trip, saw it, assumed it came from Chicago Avenue, and deposited it.

Respondents point out that when the undercover investigator tried to make a second purchase using a voucher, the voucher was refused. They also point out that it makes no sense to jeopardize \$8,000-\$10,000 worth of sales per month in order to make an extra \$25.00. All this, they argue, supports their claim that the use of the Chicago Avenue vendor stamp on the Brothers voucher was a simple mistake by their father.

Respondents further argue that the denial of the WIC license for Brothers as a result of the same incident is punishment enough.

The Administrative Law Judge believes that this is a case where the staff could have used its prosecutorial discretion to not seek disqualification. But the staff did exercise its discretion in deciding to pursue disqualification. There is nothing legally wrong with that judgment call. The facts bear out the staff's position that a violation did occur. The staff's choice of how to deal with that violation is a discretionary decision which the staff was entitled to make. However, it is also a discretionary decision which the Commissioner is entitled to overrule in the exercise of her judgment.

II.

The letter and the Notice of and Order for Hearing both based the disqualification on only one violation – the use of the Chicago Avenue vendor stamp on the voucher accepted at Brothers on March 3. They say nothing about any other violations. Therefore, the Administrative Law Judge has not made any conclusions regarding any other possible violations, nor has he taken them into account in passing upon the Department's judgment call. The Commissioner is also barred from considering them.

The federal rule which governs this proceeding, 7 C.F.R. § 246.18(b)(1), requires the Department to notify the vendor of the "cause(s) for" the disqualification. Similarly, Minn. Rule pt. 1400.5600, subp. 2(D) requires that the Notice and Order for Hearing state the allegations or issues to be determined. In this case, the notice of disqualification referred only to the vendor stamp issue, and the Notice of and Order for Hearing similarly mentioned only the vendor stamp issue. Therefore, the Administrative Law Judge and the Commissioner are limited to that issue in deciding this matter.

AWK